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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Serial No.: 10/692,402 Confirmation Number: 8500
Applicant: James A. Vanek
Filed: October 23, 2003
Group #: 1723
Examiner: Tony Glen Soohoo

Docket No: Sport.201
Customer No: 23855
For: Collapsible Mixing Wand

MS Appeal
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

07/19/2006 BABRAHA1 00000049 10692402
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Sir:

APPEAL BRIEF UNDER 37 C.F.R. §41.37

In support of the appeal to the final rejection of the claims in the above-referenced application, dated March 14, 2006, and the Notice of Panel Decision from Pre-Appeal Brief Review, dated June 16, 2006, Appellant respectfully submit the following Appeal Brief.

1. Statement of the Real Party in Interest under 37 C.F.R. §41.37 (c)(1)(i)

The real party in interest is Sport USA, L.L.C., having a place of business at 34012 Skyway Drive, Scappoose, Oregon 97056. The inventor is James A. Vanek, who has assigned all of his rights to Sport USA, L.L.C.

2. Status of Related Appeals and Interferences under 37 C.F.R. §41.37(c)(1)(ii).

There are no related Appeals or Interferences.

3. Status of all Claims under 37 C.F.R. §41.37(c)(1)(iii).

There are three independent claims: claims 1, 8 and 13. There are two dependent

claims depending from claim 1: claims 6 and 7. There is one dependent claim depending from claim 8: claim 11. Claims 2-5, 9, 10, 12 and 14-17 have been cancelled.

4. Status of Amendments under 37 C.F.R. §41.37(c)(1)(iv)

No amendments after final rejection have been filed.

5. Summary of the Claimed Subject Matter under 37 C.F.R. §41.37(c)(1)(v)

The invention is a mixing apparatus, and specifically a mixing wand which is insertable through a pour spout on a container of material to be mixed. The mixing wand includes a shaft having mixing blades at one end thereof. The blades are polymer blades which flex upon rotation, in a first direction, to extend or rotate outwardly to provide a mixing force to the material being mixed. The blades flex inwardly thus collapsing to a state where they may be withdrawn from a narrow opening in a container. Such inward flexing may be accomplished by rotating the blades in a direction opposite the first direction, by stopping all rotation, or by withdrawing the mixing blades through the container opening.

6. Grounds of Rejection to be Reviewed on Appeal under 37 C.F.R. §41.37(c)(1)(vi)

Ground A: Claims 1, 7 and 8 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U. S. Patent No. 3,223,389 to Simmonds.

Ground B: Claims 6, 11 and 13 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Simmonds in view of U. S. Patent No. 4,083,653 to Stiffler and U. S. Patent No. 6,419,385 to Walls.

Ground C: **Claims 6, 11 and 13 stand rejected** under 35 U.S.C. § 103(a) as being unpatentable over Simmonds in view of U. S. Patent No. 4,872,764 to McClean and Walls.

7. Arguments under 37 C.F.R. § 41.37 (c)(1)(vii)

Ground A: Claims 1, 7 and 8 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U. S. Patent No. 3,223,389 to Simmonds. In response to the first Office action in this cases, independent claim 1 was amended to recite that the mixer assembly includes a ***flexible*** polymer blade set having plural, integrally formed blades, and wherein each blade has a twist intermediate an attachment end which is attached to a blade set hub and a free end. This is disclosed in the Specification, page 6, line 11 to page 7, lines 4, and Fig. 9. The polymer blades flex, upon rotation in a first direction, to extend or rotate outwardly to provide a mixing force to the material being mixed. When rotated in the opposite direction, the blades flex inwardly, thus collapsing to a state where they may be withdrawn from a narrow opening in a container. The blades also collapse when rotation is stopped, or when they are withdrawn through the opening in a container.

Although the Examiner states that such construction is obvious in light of '389 because polymer mixing blades are known, Applicant contents that this rejection is not well taken. Initially, the Examiner did not provide any art whatsoever which disclosed a polymer mixing blade. This was rectified in the second, final Office action, however, the applied art, (Simmonds, '389) does not teach nor suggest the provision of a FLEXIBLE blade, nor does Simmonds teach a blade having a twist intermediate the ends thereof, which limitations have been completely ignored by the Examiner, and has apparently been ignored by the Panel. If, by some stretch of the imagination, Simmonds is meant to have flexible blades because the blades of Simmonds rotate from a one position to another, the limitation of polymer is being ignored. The twist limitation is also ignored.

The primary reference, Simmonds, says little about the material used in the device of the patent, however, it is clear that the blades are metallic, flat and non-flexible. The blades may be considered to flex *relative to the shaft*, however, the blades are not flexible *per se*, which is required

by Appellant's claims. Thus, claim 1, is allowable over the applied art because there is a clear deficiency in support of the final rejection in that the Examiner has failed to cite and apply art wherein the mixer assembly includes a flexible polymer blade set having plural, integrally formed blades, and wherein each blade has a twist intermediate an attachment end which is attached to a blade set hub and a free end.

Claim 7 stands or falls with its parent, independent claim 1.

Claim 8 differs from claim 1 in that the mixing assembly is required to have four blades therein. It is allowable for the reasons set forth in connection with claim 1.

Ground B: Claims 6, 11 and 13 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Simmonds in view of U. S. Patent No. 4,083,653 to Stiffler and U. S. Patent No. 6,419,385 to Walls.

Claims 6 and 11 stand or fall with their parent, independent claims 1 and 8, respectively.

Claim 13 is allowable because the combination of Stiffler and Walls with Simmonds still does not result in a mixing wand having a mixer assembly attached to an elongate shaft at a mixer attachment end thereof by a fixing mechanism, for rotation relative to the longitudinal axis of the shaft and sized to clearance fit through an industry standard pour spout when in a collapsed condition, wherein said mixer assembly includes a flexible PVC polymer blade set having plural, integrally formed blades, wherein each blade has a twist intermediate an attachment end which is attached to a blade set hub and a free end.

Stiffler describes a mixing wand similar to that of Simmonds, except that the mixing blades are perforated and have the requisite twist between the ends thereof.

Walls describes a paint mixer which is not intended to clearance fit through an industry standard spout, and, while it has metal or PVC blades, the description of the blades, col. 3, lines 26-60, makes it clear that the blades are not flexible as that term is defined and used by Appellant. The blades are identified as being stamped out of a single sheet of flat plastic and bent into the illustrated shape. Col. 3, lines 56-59. Were the blade flexible, there would be no need to bend the blades into the illustrated shape - they would flex on their own, and were they flexible as that term is used by Appellant, they would not retain the illustrated shape, which they must clearly do in order to have any utility as envisioned by Walls.

Simmonds does not teach nor suggest the provision of a FLEXIBLE blade, nor does Simmonds have a blade having a twist intermediate the ends thereof. If, by some stretch of the imagination, Simmonds is meant to have flexible blades because the blades of Simmonds rotate from a one position to another, the clear meaning of flexible as used by Appellant is ignored. The same is true for the application of Stiffler to Appellant's claims.

Clearly, the Examiner-concocted combination produces a mixer having (1) metal or rigid plastic blades (2) with or without a twist intermediate the ends of the blades, and (3) with or without holes in the blades. The combination does not teach nor suggest a mixing wand having a mixer assembly attached to an elongate shaft at a mixer attachment end thereof by a fixing mechanism, for rotation relative to the longitudinal axis of the shaft and sized to clearance fit through an industry standard pour spout when in a collapsed condition, wherein said mixer assembly includes a flexible PVC polymer blade set having plural, integrally formed blades, wherein each blade has (1) a twist intermediate an attachment end which is attached to a blade set hub and (2) a free end.

Ground C: **Claims 6, 11 and 13 stand rejected** under 35 U.S.C. § 103(a) as

being unpatentable over Simmonds in view of U. S. Patent No. 4,872,764 to McClean and Walls.

Walls describes a cocktail mixer having blades rotatably attached to a shaft for mixing libations.

Claims 6 and 11 stand or fall with their parent, independent claims 1 and 8, respectively.

The combination of McClean and Walls with Simmonds still does not result in a mixing wand having a mixer assembly attached to an elongate shaft at a mixer attachment end thereof by a fixing mechanism, for rotation relative to the longitudinal axis of the shaft and sized to clearance fit through an industry standard pour spout when in a collapsed condition, wherein said mixer assembly includes a flexible PVC polymer blade set having plural, integrally formed blades, wherein each blade has a twist intermediate an attachment end which is attached to a blade set hub and a free end.

The mixing apparatus of McClean is similar to that of Simmonds.

Walls describes a paint mixer which is not intended to clearance fit through an industry standard spout, and, while it has metal or PVC blades, the description of the blades, col. 3, lines 26-60, makes it clear that the blades are not flexible as that term is defined and used by Appellant. The blades are identified as being stamped out of a single sheet of flat plastic and bent into the illustrated shape. Col. 3, lines 56-59. Were the blades flexible, there would be no need to bend the blades into the illustrated shape - they would flex on their own, and were they flexible as that term is used by Appellant, they would not retain the illustrated shape, which they must clearly do in order to have any utility as envisioned by Walls. If, by some stretch of the imagination, Simmonds is meant to have flexible blades because the blades of Simmonds rotate from a one position to another, the clear

meaning of flexible as used by Appellant is ignored. The same is true for the application of McClean to Appellant's claims.

Clearly, the Examiner-concocted combination produces a mixer having (1) metal or rigid plastic blades (2) with or without a twist intermediate the ends of the blades, and (3) with or without holes in the blades. The combination does not teach nor suggest a mixing wand having a mixer assembly attached to an elongate shaft at a mixer attachment end thereof by a fixing mechanism, for rotation relative to the longitudinal axis of the shaft and sized to clearance fit through an industry standard pour spout when in a collapsed condition, wherein said mixer assembly includes a flexible PVC polymer blade set having plural, integrally formed blades, wherein each blade has (1) a twist intermediate an attachment end which is attached to a blade set hub and (2) a free end.

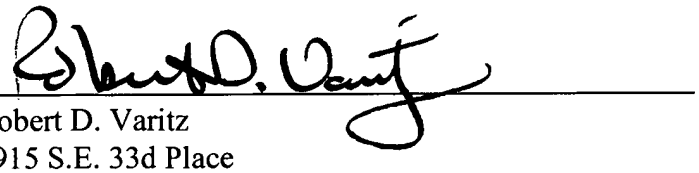
Having shown that the applied art does not teach nor suggest the appellant's invention as claimed, Appellants request that the Examiner's final rejection of these claims be reversed.

Customer Number

23855

Respectfully Submitted,

ROBERT D. VARITZ, P.C.



Registration No: 31436
Telephone: 503-720-1983
Facsimile: 503-233-7730

Robert D. Varitz
4915 S.E. 33d Place
Portland, Oregon 97202

RDV:bd

8. CLAIMS APPENDIX TO APPELLANT'S BRIEF under 37 C.F.R. § 41.37 (c)(1)(viii)

The claims on appeal in the above-referenced application are reproduced hereinbelow as follows:

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Claim 1. A collapsible mixing wand comprising:

an elongate shaft having a longitudinal axis therealong, a free end and a mixer attachment end;

a mixer assembly attached to said elongate shaft at the mixer attachment end thereof by a fixing mechanism, for rotation relative to said longitudinal axis, wherein said mixer assembly includes a flexible polymer blade set having plural, integrally formed blades, and wherein each blade has a twist intermediate an attachment end which is attached to a blade set hub and a free end;

wherein, when said elongate shaft is rotated in a first direction, said mixer assembly rotates to an extended condition; and when said elongate shaft rotates in a second direction, said mixer assembly rotates to a substantially collapsed condition.

Claims 2 - 5 CANCELLED

Claim 6. The collapsible mixing wand of claim 1 wherein said elongate shaft includes a reduced diameter portion at the free end thereof for attachment of a power head.

Claim 7. The collapsible mixing wand of claim 1 wherein said mixing assembly is sized with a diameter to be clearance fittable through an industry standard pour spout of a mixing container.

Claim 8. A collapsible mixing wand comprising:

an elongate shaft having a longitudinal axis therealong, a free end and a mixer attachment end;

a mixer assembly attached to said elongate shaft at the mixer attachment end thereof by a fixing mechanism, for rotation relative to said longitudinal axis, wherein said mixer assembly includes a flexible polymer blade set having plural, integrally formed blades, wherein said mixing assembly includes a least four elongate blades having a twist intermediate the ends thereof, disposed on said mixer attachment end;

wherein, when said elongate shaft is rotated in a first direction, said mixer assembly rotates to an extended condition; and when said elongate shaft rotates in a second direction, said mixer assembly rotates to a substantially collapsed condition.

Claims 9 and 10 CANCELLED

Claim 11. The collapsible mixing wand of claim 8 wherein said elongate shaft includes a reduced diameter portion at the free end thereof for attachment of a power head.

Claim 12. CANCELLED

Claim 13. A collapsible mixing wand for mixing material in a container, the container having a lid with an industry standard pour spout, comprising:

an elongate shaft having a longitudinal axis therealong, a free end having a reduced diameter portion for attachment of a power head, and a mixer attachment end;

a mixer assembly attached to said elongate shaft at the mixer attachment end thereof by a fixing mechanism, for rotation relative to said longitudinal axis, and sized to clearance fit through an industry standard pour spout when in a collapsed condition, wherein said mixer assembly includes a flexible PVC polymer blade set having plural, integrally formed blades, wherein each blade has a twist intermediate an attachment end which is attached to a blade set hub and a free end;

wherein, when said elongate shaft is rotated in a first direction, said mixer assembly rotates to an extended condition and exerts a downward force on the material in the container located proximal to said mixing assembly; and when said elongate shaft rotates in a second direction, said mixer assembly rotates to a substantially collapsed condition.

Claims 14 - 17 CANCELLED

9. EVIDENCE APPENDIX TO APPELLANT'S BRIEF under 37 C.F.R. § 41.37 (c)(1)(ix)

NONE

10. RELATED PROCEEDINGS APPENDIX TO APPELLANT'S BRIEF under 37 C.F.R. § 41.37 (c)(1)(x)

NONE

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MS Appeal
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

Robert D. Varitz